BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of SBC Communications,	)	
Inc. Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	CC Docket No. 97-121
Provide In-Region, InterLATA	)	
Services in Oklahoma	)	

REPLY COMMENTS OF MCI TELECOMMUNICATIONS CORPORATION

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EXECUTIVE SUMMARY

MCI Telecommunications Corporation ("MCI") submits the following reply comments concerning the application of SBC Communications, Inc., and its subsidiaries Southwestern Bell Telephone Company and Southwestern Bell Long Distance (collectively "SWBT") to provide originating interLATA services in Oklahoma pursuant to section 271 of the Communications Act, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act"). MCI's reply comments address the *Evaluation of the United States Department of Justice* (May 16, 1997) ("DOJ Eval."), the *Comments of BellSouth Corporation in Support of Application by Southwestern Bell for Provision of In-region, InterLATA Services in Oklahoma* (May 1, 1997) ("BST Comments"), and the *Comments of Bell Atlantic* (May 1, 1997) ("BA Comments").

The salient facts before the Commission are, as the Department of Justice ("DOJ" or "Department") found:

(1) There are no operational facilities-based competitors providing service to residential customers (DOJ Eval. 20); and

(2) SWBT has not provided numerous checklist items, even under DOJ's definition of "provide."[1]

[1] The Department concluded that SWBT has not carried its burden to show that it has provided multiple checklist items, including that SWBT has failed to provide network elements and interconnection at cost-based prices. DOJ Eval. 26-36, 61.

The Commission should deny SWBT's application based on these fundamental inadequacies. It need not go further and address whether SWBT has satisfied other elements of the Act, including section 272 and the public interest standard.

Relying solely on the theoretical possibility that competitive local exchange carriers ("CLECs") will refrain from entering certain markets or from requesting certain checklist items, BellSouth and Bell Atlantic suggest that the test for interLATA entry under section 271 should be whether a BOC has made sufficient *efforts* to allow competition to develop. The BOCs argue that they must be allowed into the interLATA market as long as they have not acted in bad faith in offering to provide checklist items. As DOJ concluded, the factual predicate for this argument does not exist in Oklahoma, where SWBT has not complied with its obligations, and where numerous competitors are trying to overcome SWBT's obstructionist tactics. *See, e.g.,* DOJ Eval. 54-62. In any event, that is not the test Congress established in section 271. Section 271 requires an *objective* analysis of market implementation based on results.

In their attempt to replace the statutory requirement with a test based on purported fault, BellSouth and Bell Atlantic misapply Track B, re-define the Track A requirement that each checklist item be "provided" and "fully implemented," and pretend that the public interest requirement does not exist at all. DOJ properly rejects these arguments, concluding that Track B is inapplicable to SWBT's application because competing providers have requested interconnection agreements with SWBT. DOJ also recognizes that Track A cannot be satisfied by mere paper offers or other promises to provide checklist items. DOJ Eval. 23. The Act requires that all checklist items be provided. The ordinary meaning of this statutory language,

and the legislative history, confirm that "provide" means that the items are being supplied to CLECs and are operational.

The BOCs claim to be concerned that they may be fully capable of furnishing a checklist item in commercially significant quantities but that not a single CLEC will want to take advantage of the fully functioning system. As the Department found, however, that scenario is not presented by SWBT's application. In the absence of fanciful situations the Commission can consider if they are ever presented, the Commission should insist on commercial usage in order to determine if checklist items are being provided. It takes *two* sets of computerized systems and personnel to determine if an electronic *interface* for handling thousands of orders works as required. Systems requiring *interaction between two users* have not been "provided" until they are operational for both users. Thus, the BOCs' analogies to food items and to ladders (Ameritech 271 Application p.20 n.19 (May 21, 1997)) are inapt, because it is possible to verify that both have been "provided" *without* evidence of interaction between two required users. Finally, the failure of Pacific Bell's operations support systems ("OSS") demonstrates that in addition to analyzing actual usage, it is critical to examine usage in *commercially significant quantities* before declaring a system adequate. *See* DOJ Eval. at 68.

If the requirement that checklist items be "provided" is redefined as the BOCs propose, so that checklist items need only be "made available" or "offered," the BOCs will have every incentive to game the system in order to claim that they have made an item available but that no one has wanted it. For example, BOCs can produce selective results of limited OSS tests with hand-picked partners or consultants, as Bell Atlantic has done, at the same time refusing to

provide specifications far enough in advance to allow CLECs to develop compatible interfaces and participate in realistic testing and commercial use. Under the BOCs' interpretation of Track A, they can announce, for the first time, that a system is "available" and fully tested on day 1, and on day 2 claim that no CLEC has yet used it. Indeed, Ameritech employed precisely this approach in the section 271 application it filed with the Commission last week. There are, however, *three, and only three*, exceptions to the requirement for an objective determination whether a BOC is providing, and not just offering, each checklist item to predominantly facilities-based providers of telephone exchange service to business and residential subscribers -- the three situations in which Track B is available: if all CLECs have refused to request an interconnection agreement, or if the applicable state commission finds that CLECs bargained in bad faith or failed to implement an agreement on a timely basis.

Similarly, in applying the public interest test, it is important that the Commission focus on objective market factors, not counter-accusations about good faith or lack thereof, and that the Commission address the competitiveness of the marketplace apart from its threshold analysis of checklist compliance. Whether competition has developed in local markets *is* the test of market openness; it is not simply evidence that can be rebutted by arguments concerning the cause of the continued monopoly. This is so because in every state there are already potential competitors actively seeking local entry. Moreover, substitution of a review of checklist issues for the role Congress envisioned in enacting the public interest test -- an assessment of whether local markets are competitive -- would be contrary to the Act and Congress' intent in enacting the public interest requirement as an additional requirement under section 271. Once a finding has been

made, as here, that there is no meaningful local competition, BOC entry into in-region long-distance service is not in the public interest, regardless of checklist compliance.

It is also important to recognize that premature BOC entry into long distance would not only delay the advent of competition in the local market, but would also damage the already competitive long-distance market. The increased reliance on customized software-driven networks and multimedia applications greatly increases the ability of BOCs to discriminate against competitors by using their bottleneck power. The long-distance market can also be harmed by the BOCs' ability to engage in price discrimination, including through cost-shifting and inflated access charges. BOCs that enter the in-region long-distance market will have ample opportunities to act on their incentive to discriminate against, and refuse to cooperate with, their long-distance competitors, creating distortions in the long-distance market and harm to consumers.

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I. ASSESSING COMPLIANCE WITH THE COMPETITIVE CHECKLIST REQUIRES AN OBJECTIVE ANALYSIS OF OPERATIONAL SYSTEMS.

BellSouth and Bell Atlantic acknowledge that the overarching purpose of the 1996 Act is to open all telecommunications markets to competition. BA Comments at 2; BST Comments at ii. Indeed, BellSouth correctly notes that like the antitrust laws, the 1996 Act was drafted to protect competition and consumers, not competitors. *See* BST Comments at ii. Nonetheless, Bell South and Bell Atlantic, like SWBT, advance an interpretation of the Act that conditions their long-distance entry exclusively on their actions and purported effort, without regard to objective market facts.

The CLECs' comments and the DOJ Evaluation demonstrate that SWBT is not trying to allow competition, but instead has created numerous competitive roadblocks. *See, e.g.*, MCI May 1 Comments pp. 4-15; DOJ Eval. 26-35, 54-66. Thus, were it at all relevant, the Commission could readily conclude that it is in fact SWBT's "fault" that competition has not developed in Oklahoma. *See* DOJ Eval. 56. But to speak in these terms is to misconstrue section 271.

Even if a BOC shows that it has acted in good faith up to the point of its application, validation of the BOC's *implementation* of checklist items must be demonstrated, and performance benchmarks must be established. If a BOC is able to enter long distance before competitors have used its systems at significant volumes, there is no way to know whether its

complex processes for interconnection and unbundling truly will work as advertised. *See, e.g.,* DOJ Eval. 81, 88-89. And if BOCs are permitted to enter the long-distance market before the functioning of interconnection and access has been tested and proven in actual marketplace conditions, they will no longer have the incentive to iron out the inevitable difficulties that will arise with these systems and processes. *See, e.g.,* DOJ Eval. 45, 81.[2] Similarly, if BOCs enter the long-distance market based on their claims of good faith efforts, rather than proof that checklist items have been provided and fully implemented, there will not be a sufficient track record to establish performance standards needed to prevent backsliding. DOJ Eval. 47.

Because premature BOC entry into long-distance will cause real and *permanent* damage to the prospects for local competition, whereas delayed entry will only temporarily limit BOC competition in the already competitive long-distance market, the Act does not allow BOCs to enter long distance simply by proving that they have made efforts to provide checklist items. Instead the Act requires that checklist items actually be "provided" to CLECs and fully implemented. Moreover, Congress decided that even full implementation of the checklist is not enough. It required the existence of predominantly facilities-based competitors serving both business and residential customers,[3] and it required a showing that BOC entry into long distance

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[2] Thus, a Pacific Bell Vice President candidly admitted in testimony before the California Public Utilities Commission that "[y]ou can do all the testing you want, but the theoretical world does not always translate one-for-one into the real world. Many difficult problems are encountered that simply cannot be accounted for readily ahead of time." Direct Testimony of Jerald R. Sinn, at p.3, *MCI Telecommunications Corp. v. Pacific Bell* (Cal. PUC No. 96-12-026) (May 2, 1997).

[3] DOJ erroneously concludes that the Track A requirement of predominantly facilities-based carriers providing service to residential and business subscribers does not require that residential

would actually serve the public interest. Allowing BOCs to enter the long-distance market simply because they supposedly have "tried hard" reads the full implementation requirement, the facilities-based competition requirement, and the public interest test completely out of the statute. The absence of fully functioning systems proves that BOCs have not tried hard enough.

That Track A is about provisioning of checklist items is made even more apparent by Track B, where CLEC conduct *is* a relevant consideration. Even Track B is triggered not by

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service be provided predominantly over a competitor's own facilities. Addendum to the Evaluation of the U.S. Dept. of Justice (May 21, 1997), at 2-4. The plain meaning of section 271(c)(1)(A) is that the predominance requirement applies "for purposes of this subparagraph" -- *i.e.*, the entire section (c)(1)(A). No exception is made for residential service. If Congress had intended that the predominance requirement apply only to business service (or only to residential service), it would have so stated.

DOJ's reliance on the language in Track A referring to facilities-based service in combination with resale is misplaced. Track A simply states that service must be provided *exclusively* over a carrier's own facilities *or* "predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier." The reference to resale clearly means that service need not be 100% facilities-based; a portion of service may be made by means of resale as long as the service is predominantly facilities-based. The reference to resale is simply not germane to whether the predominance requirement applies to both residential and business customers.

Moreover, although DOJ states that there would be "no beneficial competitive purpose" served by insisting on facilities-based service for any particular "class of customers," DOJ Addendum at 3-4, Congress concluded, and it is a basic market fact, that opening local markets requires facilities-based competition. While it may not be significant whether certain subclasses of customers are served by competitors that are not predominantly facilities-based, meaningful competition will never occur if that class is the tens of millions of residences served only by BOC loops. The BOCs' local monopolies will remain firmly intact as long as they retain a stranglehold over the wires extending to the vast majority of users. The "last mile" extending to residences is the most difficult part of the BOC monopoly to overcome. It would do violence to Congress' insistence on facilities-based competition to excuse this requirement where it is most needed.

BOC good behavior, but by specified conduct of competitors that obstructs the development of local competition -- refusal to request access, negotiate in good faith, or honor the implementation requirements of interconnection agreements. In the absence of one of these specified actions, the relevant consideration is not whether the BOC has expended effort, but whether the BOC has fully implemented the competitive checklist and demonstrated through actual provisioning that new entrants can obtain efficient, reliable, and scalable interconnection and access.

The BOCs' misreading of the Act begins with their interpretation of the scope of Track B. The BOCs interpret Track B as applicable whenever no facilities-based competitor providing service to business and residential customers has yet developed. BST Comments at 5; BA Comments at 9. They assert that otherwise, the BOC may still be foreclosed for some time from entering the long-distance market even if it has made efforts to open its market. BST Comments at 6-11; BA Comments at 14. Of course, under the BOCs' nonsensical interpretation, the BOC would be entitled to use Track B even if it *did* act in bad faith -- even if it deliberately frustrated the development of facilities based competition -- because under the BOCs' view, Track B is available whenever no facilities-based competitor is providing service to business and residential customers. As the Department explains, to adopt the BOCs' interpretation is to expand Track B into the normal path of entry and eviscerate the important requirements of Track A. DOJ Eval. 9-20.

In establishing the requirements of Track A, as DOJ correctly notes, "Congress understood that some time would be necessary before an agreement would be fully implemented

and a provider would become operational." DOJ Eval. 13. As fully set forth in MCI's May 1 Comments (pp. 15-22), and in DOJ's Evaluation (pp. 18-20), Track B is inapplicable because competing providers have requested interconnection agreements with SWBT within the statutory time limits.

The BOCs also misinterpret the Track A requirement that checklist items be provided, and ignore section 271's full-implementation requirement. According to the BOCs, even under Track A they need only show that checklist items have been "made available." BA Comments at 7; BST Comments at 11. But this confuses the requirements of Track A with those of Track B, which permits the BOC to *offer* checklist items in a statement of generally *available* terms (with, of course, the requisite proof that these items truly are available). As the Department recognizes, Congress adopted Track A as the ordinary entry vehicle because it saw the presence of an operational competitor *actually using* the checklist items as critical evidence that the market had been opened to competition. DOJ Eval. 10.

The Department further recognizes that "initial entry efforts may reveal that in spite of paper assurances, the BOC is unable or unwilling to provide the inputs needed by competitors in a timely and reliable manner, in the quantities needed to permit effective competition" (DOJ Eval. 45), and that "industry experience demonstrates that, even after significant testing between BOCs and CLECs, wholesale support processes, both automated and human, rarely function as advertised and almost never practicably provide resale services and unbundled elements prior to enduring the rigors of commercial trials" (DOJ Eval. 81). Thus, the Department recognizes, as MCI stated in its May 1 Comments (pp.15-26), that a paper commitment to provide a checklist

item, or an offer to provide an item in the future, does not demonstrate that the BOC is providing the item in compliance with Track A. DOJ Eval. 22-23. The Department concludes that in the normal case, a BOC is "providing" an item only if it has been successfully deployed commercially. *See, e.g.,* DOJ Eval. 23, 29-30.

DOJ suggests that it might consider evidence short of successful commercial use in the event of a hypothetical scenario in which there are no CLECs that intend to use a particular checklist item. DOJ Eval. 22-23, 30. It is pure speculation, however, that CLECs will ever refrain from using a particular checklist item that is truly "available" without improper constraints or conditions. There is no evidence that this scenario will ever be present in any jurisdiction.[4] The Commission should not reach to render an advisory opinion on issues that have not been presented through concrete facts fully litigated by interested parties.

MCI agrees with the Department's view that it is exceedingly difficult for a regulator to judge the adequacy of an item that is new to commerce (including mutually developed processes) in the absence of commercial use. *See* DOJ Eval. 30, 45-48. That is why Congress made the judgment that actual commercial use, and nothing less, should be the test of checklist compliance.

If the Commission chooses to promulgate a rule of general applicability, it should be framed to explain the great run of situations to which it is intended to apply, and not to an exceptional case that may never occur. Thus, the Commission should give "provide" its ordinary

[4] In Michigan, for example, CLECs intend to use unbundled switching, but have not yet ordered that item because Ameritech is not ready to provide it.

meaning of "supply" or "furnish" and insist on commercial use as evidence that a checklist item has been provided. A watered-down interpretation of Track A will create numerous problems and likely solve none. The effect will be to delay or prevent altogether full implementation of the competitive checklist, and thereby delay the development of local competition -- as well as to encourage additional premature applications under section 271. Given only an exceedingly remote possibility that interpreting "provide" to require commercial use will work hardship on any BOCs, and a virtual certainty that a loose definition will inhibit local competition, the Commission should give "provide" its normal meaning and should also enforce section 271's parallel requirement of "full implementation" to require commercial operation of all checklist items.

Finally, the BOCs' suggestion that CLECs will delay entering a particular market or requesting a particular checklist item is not only hypothetical, but is contradicted by actual experience in every state in the nation. Congress thought that each of the checklist items was essential to competition and would be used by CLECs. Marketplace experience confirms that Congress was correct. CLECs such as MCI have a business imperative to enter local markets as quickly as possible. Local markets are twice the size of the long-distance market, Schwartz Aff. pp. 11, 14, and profit margins in monopolized local markets are much higher than in the highly competitive long-distance market. Thus, as DOJ found, and as Congress envisioned, a wide range of companies have demonstrated serious plans and actions to compete aggressively in local markets, even in less densely populated states like Oklahoma. *See, e.g.*, DOJ Eval. 19, 49, 54-55, 90-95. As DOJ also recognizes, a number of these competitors are not in the long-distance

business, so they do not even have a theoretical incentive to hold back so that the BOCs will not compete against them in the interexchange market. DOJ Eval. 19. The BOCs cannot explain why the many CLECs who are not even in the long-distance market would want to delay local entry in order to prevent a BOC from providing interLATA service.

In fact, companies like MCI that have a substantial long-distance business often have greater business incentives to enter local markets than do CLECs without a long-distance operation. Customers want MCI to provide a full array of services so that they can satisfy all their telecommunications needs through one provider. If MCI does not do so, its competitors will. Moreover, the Commission's decision not to require BOCs to reduce access to cost in the short term creates a further business imperative for interexchange carriers to enter the local market as soon as possible in order to reduce their costs,[5] and in order to stop paying monopoly prices -- prices that lead to the profits BOCs will use to finance participation in other markets. Thus, the notion that MCI would delay entry into the local market in order to keep a BOC out of long-distance flies in the face of common sense and MCI's rational economic motives. That is why MCI intends to enter the Oklahoma market in 1998, as part of MCI's multi-billion dollar investment in local competition.

[5] *See In re: Access Charge Reform, First Report and Order* ¶ 265 (FCC 97-158 rel. May 16, 1997).

II. BOC ENTRY INTO LONG DISTANCE IS NOT IN THE PUBLIC INTEREST AS LONG AS THE BOCS' MONOPOLY POWER REMAINS INTACT.

In applying the public interest test, the Department properly focuses on objective conditions in the market and requires that local markets be "irreversibly" open to competition. DOJ Eval. 41-42. The Department correctly emphasizes that "[b]y far the best test" of openness is the emergence of actual competition. Schwartz Aff. p.7; DOJ Eval. 51. DOJ recognizes that the fact that some competition exists (as it does in Oklahoma) does not necessarily mean that a market is irreversibly open to competition or that BOC market power has been diminished. To establish irreversible openness, actual competition should be "meaningful," "significant," and "diverse." Schwartz Aff. pp. 7, 26, 58.[6]

MCI agrees with the Department that the public interest test requires that the local market has been irreversibly opened to competition in each of the three entry modes -- resale, platform, and facilities-based -- and that premature entry would harm local competition by removing the BOCs' incentives to cooperate with new entrants, and would threaten harm to long-distance competition by giving BOCs incentives and opportunities to misuse their control of the local bottleneck. *See* DOJ Eval. 36, 45-48; Schwartz Aff. pp. 3-4, 26, 37-40, 59-60. Further, MCI agrees with the Department that the benefits of increased local competition from delayed long-distance entry substantially outweigh the costs of such delay, because the long-distance market is

[6] MCI agrees with DOJ that a metrics test of competition is unnecessary. DOJ Eval. 49. The point is that the extent of actual competition is not, as the BOCs claim, legally irrelevant. To the contrary, it is vital and necessary evidence of the extent to which local markets have been opened to competition.

already competitive and the local market is not. Schwartz Aff. pp. 6, 14, 54-57. MCI also agrees that regulation cannot safeguard against anticompetitive behavior by BOCs in both local and long-distance markets unless the market for local telephone service is irreversibly open. *See* DOJ Eval. 37, 45-47; Schwartz Aff. pp. 3, 25, 45-52. However, the Department does not fully take into account the effects of anticompetitive BOC conduct if BOCs are prematurely allowed entry into the long-distance market, and at times the Department appears to conflate the checklist requirements with the independent requirement that BOC entry into long-distance serve the public interest.

A. The Public Interest Test Requires an Objective Analysis of the State of Local Competition Independent of Checklist Compliance.

The Department properly views the public interest test as establishing regulatory review requirements that are distinct from those of the competitive checklist. *See* DOJ Eval. 37-38. The degree to which other carriers are actually providing local exchange and access services in competition with the BOC should be the heart of any public interest analysis. The Department, with its years of experience evaluating competition and the risks to competition from BOC bottleneck power, is particularly suited to assess the extent to which competition has become established. If this inquiry reveals that the BOCs' local monopoly is intact, BOC entry into the in-region interLATA market would harm both local and long-distance competition, regardless of the reasons why more competition has not yet developed. As explained above, the lack of success of CLECs in Oklahoma is not due to their lack of effort; it is the BOCs, not the CLECs, that have the incentive to delay local competition.

In explaining that the public interest test requires an assessment of the extent of local competition and all barriers to entry, whether or not directly attributable to the BOCs,[7] DOJ recognizes that the public interest test requires more than a demonstration that the BOCs have complied with the competitive checklist. Indeed, Congress expressly rejected an amendment that would have made compliance with the checklist sufficient for 271 authorization. *See* MCI May 1 Comments pp. 31-32.

The Department correctly concludes that SWBT "still faces no real competition in local exchange services in Oklahoma today." DOJ Eval. 51. That conclusion should end the inquiry: Given the Department's finding that potential facilities-based local competitors have sought interconnection and access in Oklahoma, *see* DOJ Eval. 18-20, 90-95, the failure of local competition to develop necessarily reflects a market that is not yet open. InterLATA entry therefore would be antithetical to the public interest.

Nonetheless, the Department treats the absence of competition as raising only a presumption that the local market remains closed, and goes on to examine the reasons competition has not developed, focusing primarily on SWBT's failure to provide various checklist items. To the extent this analysis suggests that SWBT's satisfaction of the competitive checklist could by itself demonstrate satisfaction of the public interest test, MCI respectfully

[7] Thus, for example, even if a BOC had made substantial efforts to open a local market to competition (unlike SWBT), there are entry barriers that can delay or prevent competition. *See, e.g.*, Schwartz Aff. p. 64 & nn.66-67 (discussing examples of local franchise requirements and difficulties new entrants face in gaining access to buildings).

disagrees. The Department notes that one reason competition has not yet developed is that it takes time for a competing carrier to secure an agreement with SWBT, fully implement it, and become operational. The Department then emphasizes a second reason: "SWBT has failed to provide adequate, nondiscriminatory access to essential checklist items that potential competitors have requested." DOJ Eval. 56. The Department points specifically to SWBT's failure to provide unbundled loops, physical collocation, adequate interim number portability, and adequate OSS. *See* DOJ Eval. 57-60. The Department also notes the lack of cost-based rates for unbundled elements, *see* DOJ Eval. 61-63, and criticizes SWBT's policies with respect to intellectual property rights. DOJ Eval. 64-66. MCI agrees that these shortcomings in SWBT's compliance with the Act are real and significant, and *independently* preclude 271 authorization. They are not, however, synonymous with application of the public interest test, which requires a competitive analysis of the state of the local market and evaluation of the risks to the long-distance market. A contrary conclusion would effectively nullify the public interest test and resurrect the amendment that was soundly defeated.

The legislative record includes a wealth of statements confirming this congressional understanding. One member of the Senate Commerce Committee remarked that pursuant to the Conference bill, "[t]he role provided for the Department of Justice will ensure that competition and antitrust issues will be reviewed adequately." 142 Cong. Rec. S690 (daily ed. Feb. 1, 1996) (statement of Sen. Dorgan). "The issue is how to determine the point at which entry by Bell companies will help rather than harm competition. That question, quite simply, is an antitrust matter which will be informed by the antitrust expertise" of DOJ. *Id.* at S711 (statement of Sen.

Thurmond); *see also id.* at S715 (statement of Sen. Levin) (discussing the "role for the Justice Department in determining when there is adequate competition in the local exchange"). Congress believed that such a role for the Department was necessary because of its "expertise in competition matters" and "in making predictive judgments regarding marketplace effects." *Id.* at S698 (statement of Sen. Kerrey); *see also id.* at H1165 (statement of Rep. Berman) (discussing the Department's expertise in antitrust matters and marketplace effects).

DOJ's discretion, and the Commission's ultimate decision, must be exercised in furtherance of Congress' core purposes in enacting the statute. Development of competition is the ultimate proof of an increasingly open market. Because there is no meaningful competition in the local market in Oklahoma, as the Department found, no further analysis is required to reach the conclusion that SWBT interLATA entry is contrary to the public interest at this time.

B. The Commission Should Not Discount the Risks of Harm to Competition in the Long-Distance Market.

As the Department notes, the purpose of the Telecommunications Act of 1996 is to "open[] *all* telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996) (emphasis added) (quoted in DOJ Eval. 40). It is clear from the legislative history that Congress specifically expected an evaluation of the impact of BOC entry on the long-distance market. Indeed, the standards discussed in the Conference Report involved evaluations of the effect on the market that the BOC "seeks to enter." H.R. Conf. Rep. No. 104-458, at 149 (1996).

Congress was concerned that significant competitive harms to the long-distance market could take place in the aftermath of BOC entry. Two issues deserve special emphasis. First,

BOC entry gives the BOCs a new and major incentive to discriminate against -- and fail to cooperate with -- their newly-joined competitors in the interexchange market, *unless* the local market is sufficiently competitive that the BOC requires the same types of cooperation from others that is being requested of it. As a result of the continuing technological developments that are making advanced capabilities critical to success in the provision of long-distance services, BOCs will have numerous opportunities to lower service quality and thereby increase costs to their competitors in the interexchange market. Second, the BOCs' ability to discriminate against competitors on the basis of price, especially through cost-shifting and continuing disparities between the cost and price of access, gives BOCs with long-distance affiliates an immense competitive advantage and introduces significant inefficiencies into the long-distance market.

1. Discrimination and Non-cooperation.

The Department fails to recognize the degree of danger to long-distance competition posed by BOC discrimination and non-cooperation in providing access to the BOCs' local networks. The Department's evaluation does not mention these risks, and its economic expert, Dr. Marius Schwartz, downplays the repercussions of BOC non-cooperation, on the theory that long-established arrangements between interexchange carriers and local exchange carriers are likely to prevent any significant degradation. Schwartz Aff. p.24.

Notably, Dr. Schwartz does not claim that BOCs will have no incentive to discriminate against other long-distance companies. Once long-distance carriers are competitors instead of customers, the tenor of the relationship necessarily will change. As explained by Dr. Robert Hall,

> Shareholder interest will dictate that the local carriers, such as Southwestern Bell, cease any voluntary cooperation with independent long-distance carriers, who would then be their rivals. *It is critical to understand that current levels of cooperation between local telephone companies and long-distance carriers are no guide to the level of cooperation that would occur after they became rivals.*

Hall Aff. ¶ 95 (Ex. F to MCI May 1 Comments) (emphasis added); *see also id.* ¶ 121 ("Formal economic analysis speaks with one voice that, once the access supplier competes in the downstream long-distance market, it will try to interfere with its rivals in that market. It would lower, not raise, its profit if it cooperated voluntarily.").

The BOCs' ability to act on these anticompetitive incentives should not be downplayed. To be sure, the 13-year history of long-distance interconnection has set performance benchmarks such that deviation from those benchmarks should be apparent to both competitors and regulators. However, experience has not demonstrated the effectiveness of regulatory remedies. For example, MCI filed a complaint with the Commission in July, 1996 about the abysmal quality of interexchange access provided by U S West; although U S West acknowledged problems with the quality of its access, the complaint has not been decided, and the problem remains unresolved.

In any event, even in theory benchmarking works only for those types of interconnection that have indeed been used for 13 years, or some substantial portion of that time. There is no basis for comfort where competitors require access and cooperation with respect to new types of interconnection. As Dr. Schwartz acknowledges, "Over the longer term, technical evolution could give rise to greater problems for regulators in safeguarding long-distance access if local competition fails to develop." Schwartz Aff. p.25 n.19.

This phenomenon is very much in evidence in *today's* long-distance market. The explosion in software-driven specialized services and multimedia applications have increased the BOCs' ability to discriminate against competitors. *See* Hatfield Aff. pp. 9-15 (Ex. D to MCI May 1 Comments) (discussing the increasing use of software-driven specialized services, which require interconnections to new data bases using new protocols, and multimedia applications).[8]

These types of features provide the BOCs with numerous opportunities to act on their incentives to discriminate against or fail to cooperate with their long-distance competitors. For example, a BOC could claim that implementing a particular feature for an interexchange carrier ("IXC") would cause harm to the BOC's network. It could refuse to provide certain types of interconnection unless the signaling messages pass through a "filter" controlled by the BOC, while limiting the types of messages that can pass through the filter. Or a BOC could deny a competitor access to customer information stored on the network on the grounds that the information is proprietary. Similarly, a BOC could delay its competitors' implementation of

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[8] As explained by Dale Hatfield:

> [O]ne major benefit of the developments in the incumbent's local exchange network is that the increased intelligence allows the individual fine tuning or customization of services to meet specific customer requirements. But this very ability to customize means that they can "fine tune" their local exchange networks to favor (a) their own interexchange operations over their interexchange carrier competitors and/or (b) their own end user customers over the end user customers of their interexchange carrier competitors. Stated another way, the incumbent local exchange carriers, including SWBT, will have additional -- and generally more subtle -- methods of discrimination available to them.

Hatfield Aff. pp. 15-16.

these types of features by, for example, requiring answers to numerous, unnecessary questions, by requiring extensive study of the request, or by proceeding slowly to implement competitors' requests, once approved. *See* Hatfield Aff. pp. 18-19.

As Dr. Schwartz acknowledges with respect to the new access arrangements for local competitors required to implement the 1996 Act, it is exceedingly difficult to determine whether a BOC is facilitating or impeding progress when there are no pre-existing precedents or standards on which to judge the BOC's behavior. *See* Schwartz Aff. pp. 47-48; *see also id.*, at pp. 51-52 (discussing difficulties encountered by regulators in imposing "Open Network Architecture" requirements on BOCs); DOJ Eval. 46 n.56 (same); Hatfield Aff. pp. 26-27 (the history of Open Network Architecture requirements is "an example of how the BOCs, including SWBT, can use claims of technical harm and technical infeasibility in the provision of advanced forms of interconnection to thwart or delay the development of competitive services by unaffiliated long-distance carriers and other providers"). These same problems will inevitably arise for new access arrangements for interexchange carriers. It is simply not plausible to expect that interexchange carriers that compete with the BOCs will be able to obtain access to advanced features of BOC networks on the same basis as the BOCs' long-distance affiliates.[9]

Thus, it is unrealistic to expect that, after long-distance entry, the BOCs will willingly participate in facilitating the technological cooperation that will be required. Post-entry, the

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[9] SWBT argues that it would be technologically infeasible for a LEC to manipulate its network to disfavor competitors, without cooperation from numerous outside suppliers. *See, e.g.*, Deere Aff. ¶ 130. To the contrary, many advanced systems permit providers to adjust their networks themselves; indeed, that is one of their principle virtues. *See* Hatfield Aff. pp. 28-30.

BOCs' corporate and shareholder interests will be firmly and naturally opposed to any cooperation with competitors. And the BOCs will have many opportunities to obstruct their long-distance competition under cover of alleged technological difficulties. In sum, the long-distance access market is not static but is rapidly evolving in ways that make it far easier for BOCs to succeed in discriminating against, and failing to cooperate with, new entrants.

The one safeguard that is capable of enforcing cooperation and non-discrimination for new interconnections, as well as existing interconnections, is the safeguard Congress intended to discipline the telecommunications industry: a vibrant and well-functioning telecommunications market. When the BOCs' long-distance affiliates require interconnection with competitors' local facilities on a significant scale, just as long-distance carriers are now dependent on BOC facilities, the BOCs will have incentives to cooperate with those competitors. Thus, only when IXCs have an alternative to the BOCs, whether through their own local operations or through interconnection with unaffiliated local providers, will the incumbent BOC be better off by cooperating with its long-distance competitors than by imposing unnecessary obstacles.

2. Pricing Inequities.

Dr. Schwartz appropriately recognizes the incentives that BOCs have to engage in anticompetitive behavior once they are allowed into in-region long distance markets, and the inefficiencies and harm to consumers that such anti-competitive behavior would produce, *e.g.*, Schwartz Aff. pp. 35-38, 42-44, but he underestimates the opportunity for BOCs to manipulate rates and charges if they are permitted to enter their in-region long distance markets prematurely. First, Dr. Schwartz does not fully assess the magnitude of the BOCs' ability to cross-subsidize